LIM HAI SUN

v.

OFFICER-IN-CHARGE, DRUG REHABILITATION CENTRE & ANOR.

HIGH COURT BORNEO
RICHARD MALANJUM JC
[ORIGINATING SUMMONS NO. MR 19/1991]
12 MAY 1992

ADMINISTRATIVE LAW: *Application for habeas corpus - Order to reside under the Drug Dependants (Treatment and Rehabilitation) Act 1983 - Preliminary objections - Whether application misconceived - Whether order to reside detention or custody - Whether police force need be made a party - Whether application wrongly cited under O. 7 r. 2 RHC 1980 instead of O. 54 RHC 1980 fatal.*

Three preliminary objections were raised by the defendants at the beginning of the hearing of the plaintiff's application for *habeas corpus*:

(1) That the application for *habeas corpus* was misconceived as the order to reside under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (the Act) made against the plaintiff does not amount to a detention or custody.

(2) As there were allegations against the Police Force and the Police Force was not made a party, such allegation should not be taken into account.

(3) That the order cited in the originating summons being O. 7 r. 2 RHC 1980 is incorrect as the proper order should be O. 54 for *habeas corpus* application.

Held:

[1] As the purpose and object of the writ of *habeas corpus* is to afford individual protection to one's liberty and to prevent the erosion of the right to be free and move about freely, mere usage of words or phrases in statutes without more could not deprive a person of this writ if the circumstances so warrant. Residence at a rehabilitation centre for a person so ordered to reside under s. 69(1)(a) of the Act constitutes detention although the word detention or custody was not used in the section and therefore attracts the application of the writ of *habeas corpus.*

[2] It is sufficient that the notice of summons be served on person or persons having control over the applicant/plaintiff or addressed to a person who has such control that he can order the person keeping the applicant/plaintiff to release him. As there is no dispute that the Police Force serves under the 2nd defendant, joining the 2nd defendant is sufficient in this case.

[3] Further the availability of O. 54 r. (2)(2) RHC 1980 enables the Court to order service of the summons to persons or persons who is not or are not cited as a parties in the 1st instance. The failure at this stage to include the Police Force should not be ground to dismiss an application of this nature summarily.

[4] There is no strict requirement that any application to the Court must cite the order under which the application is made. It is sufficient for the Counsel to refer to the appropriate order at the time of hearing. The omission to cite O. 54 RHC 1980 in the originating summons is not fatal to the application.

[All three preliminary objections of the defendants overruled. Application dismissed.]

Cases referred to:

Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor. [1988] 1 MLJ 45 ***(cit)***

PP v. Koh Yoke Koon [1988] 1 CLJ (Rep) 269 ***(foll)***

Andrew s/o Thamboosamy v. Supt of Pudu Prison Kuala Lumpur [1976] 2 MLJ 156 ***(dist)***

Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia, Malaysia & 3 Ors. v. Liau Nyun Fui [1991] 1 CLJ (Rep) 458 ***(foll)***

Phua Hing Lai v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors. [1990] 1 CLJ (Rep) 238 ***(foll)***

Chua Han Mow v. Superintendent of Pudu Prison [1980] 1 MLJ 219 ***(cons)***

Yeap Hock Seng v. Minister for Home Affairs Malaysia [1975] 2 MLJ 279 ***(foll)***

Legislation referred to:

Criminal Procedure Code, s. 117

Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 4(1)(b), 6(1)(a), 19(1)(c)

Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983, r. 2

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s. 4(1), s. 12(2)

Interpretation Act 1967, s. 62

For the plaintiff - Bong Ah Loi; M/s. Jaini Mardi & Associates

For both defendants - Mahmud Haji Abdullah, FC

JUDGMENT

Richard Malanjum JC:

The plaintiff applied for a writ of *habeas corpus* by way of *ex-parte* originating summons supported by an affidavit of Lim Hai Ling sworn to on 29 April 1991 (hereinafter referred to as "Lim's affidavit") and filed in the Miri High Court Registry on 2 May 1991 in connection with the order of the learned Magistrate in Marudi, Sarawak made on 26 March 1991 under s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (hereinafter referred to as the "said Act"). The hearing came before me on 23 April 1992 when the learned Federal Counsel for the 1st and 2nd defendants raised three preliminary objections. I have accordingly dismissed all the preliminary objections raised in my ruling delivered on 28 April 1992.

At the request of the parties the continuation of hearing of this application was heard in Kuching High Court on 12 May 1992. After hearing submissions from both sides I dismissed the application and indicated that I would give the reasons for the decision. I do so now.

The facts of this case as disclosed are as follows:

On 9 March 1991 the plaintiff was arrested by the police for being a suspected drug dependant. He was subsequently produced before a Magistrate who granted the order for remand of the plaintiff to be held in custody at the Miri General Hospital pursuant to s. 4(1)(b) of the said Act. It was also ordered that the plaintiff was to be produced before a Magistrate again on or before 22 March 1991 at 9.30 a.m. It may be convenient to note here that in Lim's affidavit it was stated that the Magistrate making the order for remand was Julaihi bin Abdul Kadir but from the notes of proceeding the order for remand was given by one Ambrose Labang. As to why this discrepancy arose learned Counsel for the plaintiff did not explain.

On l9 March 1991 the plaintiff was again produced before a Magistrate and this time it was Encik Julaihi Kadir. The plaintiff was subsequently released on bail with one surety in the sum of RM1,000 returnable 26 March 1991 at on 9.00 a.m.

Accordingly, on 26 March 1991 the hearing came before another Magistrate, Encik Mohd. Chee Kadir in the presence of the plaintiff, his Counsel and Chief Inspector Jabu for the Director-General of Rehabilitation. Learned Counsel for the plaintiff was given the opportunity to make his representation on behalf of the plaintiff. Thereafter the Magistrate having satisfied himself that the plaintiff was a drug dependant based on the medical report of the plaintiff issued by a Medical Officer of the Miri General Hospital and the report of the Rehabilitation Officer, made the order as per in "LHHl" of Lim's affidavit in that the Plaintiff has to undergo treatment and rehabilitation at the Drug Rehabilitation Centre Kuching for 2 years and then to undergo after-care (hereinafter referred to as "the said order").

Unfortunately the matter did not end there. The plaintiff was kept in custody at the Central Police Station Marudi from 26 March 1991 to 30 March 1991. However on 28 March 1991 the plaintiff was produced in the Magistrate Court at Marudi to answer a criminal charge under No. MMC/CR/52/91/93. He was earlier on remanded for that criminal case under s. 117 of the Criminal Procedure Code from l9 March 1991 to 28 March 1991. The plaintiff was subsequently granted bail for that criminal case. This bail of course was not much of a use to the plaintiff as there was already the said order made under s. 6(1)(a) of the said Act on 26 March 1991.

On 30 March 1991 the plaintiff was brought to Miri and was kept in custody at the Miri Central Police Station from 30 March 1991 to 3 April 1991. On 3 April 1991 he was sent to the Kuching Drug Rehabilitation Centre where he is now currently residing.

At the hearing of this application learned Counsel for the plaintiff submitted the grounds namely:

(i) that the said order no longer binds the plaintiff as there was a failure to comply with the said order strictly. It was contended that after the said order was made the plaintiff was unlawfully kept in custody in places not provided for by the said order and for such an unreasonable period; and

(ii) that r. 2 of the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983 was not complied with in that Form 1 of the said Rules was not followed.

The first limb of ground (i) of the plaintiff is that he was unlawfully detained in places other than in the Drug Rehabilitation centre Kuching after the said order was made. By reason of this his continued residence at the said centre presently is therefore unlawful. Further, [the second limb of ground (i)] owing to the delay in sending the plaintiff to the said centre such delay also makes the current residence at the said centre unlawful. Before proceeding further however I think it is appropriate here to state that the plaintiff is not questioning the issuance of the said order and as such the validity of the said order when issued is not in dispute.

Much reliance was placed on the case of *Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor* [1988] 1 MLJ 45 which case concerned a detention order made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 in support of ground (i) of this application. However I am of the view that in this instant case the facts and circumstances are quite different from the case cited.

In the first place, the statute as applied on the plaintiff in this instant case is different from that of the case cited.

> It is significant to note that in the instant case we are dealing with a different Enactment and therefore special attention must be directed to the provisions of that Enactment. It is pertinent to note that what is said to be unlawful here is the detention subsequent to the arrest and detention order...

per Tun Datuk Haji Abdul Hamid Omar LP Malaysia in *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & 3 Ors. v. Liau Nyun Fui* [1991] 1 CLJ (Rep) 458 at p. 462.

As I have stated earlier on that the validity of the issuance of the said order is not in dispute. Indeed it is the detention subsequent to the said order that is being alleged to be unlawful in the present case.

I shall first deal with the issue of places of detention prior to the plaintiff being transferred to the Drug Rehabilitation centre Kuching. Although the said order specified the place of residence of the plaintiff to be at the Drug Rehabilitation centre Kuching, I am of the view that the detention of the plaintiff in other places whilst being brought to the centre is not unlawful. This is because s. l9(1)(c) deems such detention lawful and it is clear enough to include the place whilst on transit to a Rehabilitation centre. Section l9(1)(c) of the said Act reads:

> A person shall be in lawful custody:
>
> (a) ...
>
> (b) ...
>
> (c) **while he is being taken from or to any place, ... during the period that he is under an order made under this Act** to reside at a Rehabilitation centre or an After-care centre.
>
> (Emphasis added).

Thus, if the plaintiff was deemed to be in lawful custody at the material time then ground (i) in respect of place of detention in this application has no merit and I so hold. In *Koh Yoke Koon's case (Supra)* there is no similar deeming provision as s. 19 of the said Act. In fact on appeal the Supreme Court in *PP v. Koh Yoke Koon* [1988] 1 CLJ (Rep) 269 Hashim Yeop A. Sani SCJ (as he then was) said at p. 271:

> Section 12 of the Ordinance provides further that the Minister may by order direct the removal of a person detained pursuant to a detention order from any place of detention to another place of detention to be specified in such order. Section 12(2) expressly provides that any person in the course of removal under the provisions of the order for removal made under s. 12(1) shall be deemed to be in lawful custody ... There is no similar provision in s. 4 of the Ordinance.

Further down at p. 271, His Lordship stated:

> ... Section 12 of the Ordinance provides for the order of removal of a person detained from one place of detention to another place of detention and it is only under an order under s. 12(1) of the Ordinance **that a person detained in the course of removal shall be deemed to be in lawful custody.**
>
> (Emphasis added)

The Ordinance referred to there by His Lordship is the Emergency (Public Order and Prevention of Crime) Ordinance 1969.

It was contended by learned Counsel for the plaintiff that the usage of the phrase "while he is being taken..." in s. 19(1)(c) refers to actual time of transportation. With respect I do not agree to giving such a very narrow meaning to that phrase. Surely the phrase "while he is being taken..." has the same ordinary and natural meaning and effect as "in the course of

removal" as used in s. 12(2) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. To confine to such a meaning as submitted by learned Counsel for the plaintiff would ignore the reality that transportation may not be available on the same day or circumstances may not permit the arrival of the subject at the Rehabilitation centre on the same day when the said order was made.

I am mindful of the principle that where liberty of an individual is at stake the Court should construe strictly in the interpretation of the laws and in case of doubt the Court should lean in favour of the individual (See: *Andrew s/o Thamboosamy v. Supt. of Pudu Prison Kuala Lumpur* [1976] 2 MLJ 156). However in the present case for the reason stated above I have no doubt of the scope and effect of s. l9(1)(c) of the said Act.

On the issue of delay I am satisfied that in the circumstances of this case the plaintiff was taken from Marudi to Kuching with all convenient speed by the police.

It is to be noted that s. l9(1)(c) does not provide a time frame. As such the test to be applied is convenient speed [See: *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & 3 Ors. v. Liau Nyun Fui (supra)* and *Phua Hing Lai v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.* [1990] 1 CLJ (Rep) 238].

The time between the making of the said order (26 March 1991) and the arrival of the plaintiff at the Drug Rehabilitation centre Kuching was 8 days. The learned Federal Counsel contended that the plaintiff had to be detained in Marudi up to 28 March 1991 as he had to appear in the Magistrate Court for another criminal case (MMC/CR/52/91/93) on 28 March 1991. There was also a remand order against the plaintiff in that case expiring only on 28 March 1991. Further, arrangement for transportation and escorts had to be done. There was also the problem of getting plane tickets which could not be obtained before 3 April 1991. In all learned Federal Counsel submitted that if ever there was delay, it was administrative delay. Having considered the explanation of the defendants as contained in the affidavit of Ketua Inspektor Vincent Ajang Laing affirmed on 8th May, 1992 (Laing's affidavit) for the lapse of 8 days from the date of the said order and bearing in mind the test to be applied as enunciated in the cases cited by the learned Federal Counsel, I am satisfied that the taking of the plaintiff from Marudi to the Drug Rehabilitation centre Kuching was done with all convenient speed. As such, I hold that there is also no merit on this ground (i) in respect of delay as contended by the plaintiff.

Incidently, the plaintiff had not shown that the defendants or the police had not acted with all convenient speed in sending him to the Rehabilitation centre.

> ...The question... was whether the Timbalan Menteri in the particular circumstances of that case had acted with all convenient speed in making the restriction order. Strictly it was for the respondent to show that the Timbalan Menteri had not so acted and not for the Timbalan Menteri to provide explanation acceptable to the Court... He further argued that investigation had to be made and various statements had to be recorded and all these had to be effected in Sabah. If that had been the case all that was needed for the Timbalan Menteri to do was to say so in the affidavit. If he had done that the onus would have rested on the person contending that the Timbalan Menteri had not so proceeded to satisfy the Court that the Timbalan Menteri had not acted with convenient speed.

per Tun Datuk Haji Abdul Hamid Omar LP in *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & 3 Ors. v. Liau Nyun Fui (supra)* at pp. 463 & 464. In the instant case the defendants had stated the reasons for the lapse of 8 days from the date of the said order. The plaintiff did not rebut those reasons and had not therefore shown that the defendants or the police did not act with convenient speed.

As for ground (ii), that is, failure to comply with Form 1 of the Drug Dependants (Treatment and Rehabilitation) (Forms) rr. 1983 which is stipulated by r. 2 of the said rules, I do not find any merit on this ground as well. In the first place learned Counsel for the plaintiff conceded that "LHH2" of Lim's affidavit which was used instead of Form 1, was not a document to be considered by the learned Magistrate before making the said order. Such stand taken by the learned Counsel is consistent with the fact that the validity of the issuance of the said order is not disputed. Secondly, as the validity of the issuance of the said order is not disputed this point alone defeats ground (ii) of the plaintiff. Even if I am wrong on this point, I am of the view that "LHH2" did not have substantial effect and was not calculated to mislead [See: s. 62 of the Interpretation Act 1967 (Act 388)]. The plaintiff had also not shown that he was prejudiced and thereby had occasioned a failure of justice by the non-compliance of Form 1. (*See: Chua Han Mow v. Superintendent of Pudu Prison* [1980] 1 MLJ 219).

It is also to be noted that learned Counsel for the plaintiff submitted that it was the defendants that failed to comply with Form 1. However, with respect, I do not think the defendants had any say on the issuance of Form 1 under the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983 as it should be done by a Magistrate making the order for remand. Further, in the instant case learned Counsel when asked by the Court on his stand on the status of the issuing person of "LHH2", stated that he had no objection and went on to say that the issuing person was an *ex-officio* a Magistrate.

For the above reasons I have dismissed the application of the plaintiff. No order as to costs.

Before concluding I wish to state one other point. The application of the plaintiff was filed on 2 May 1991 yet it was not disposed of sooner. Application of this nature is entitled to precedence over all other proceedings on the same day and Counsel for the applicant should make all attempts to have the application heard within shortest time possible. Otherwise the long delay for the hearing to come by as in this case, over 12 months, will defeat the very essence of this "high prerogative writ of summary character for the enforcement of this cherished civil right of personal liberty ... ". (See*:* per Abdoolcader J (as he then was) in *Yeap Hock Seng v. Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279).

Also found at [1992] 3 CLJ 1602